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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 20 2007
SRC 06 094 50411

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition for abandonment, reopened the matter on motion, and denied the matter again on the merits of the petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as an electrical engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner asserts that the standards used by the director are not appropriate for the petitioner's occupation. While we acknowledge that engineers may influence the field in ways other than through published, peer-reviewed articles, the petitioner has not submitted such evidence in this matter. Specifically, the petitioner relies on letters from his immediate circle of colleagues and does not submit objective evidence of his purported accomplishments such as patents or patent applications listing the petitioner as an inventor, sales data for his innovations and independent evaluations of the significance of his engineering accomplishments. In fact, as will be discussed below, the petitioner is not a listed inventor on the patent application referenced on appeal.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner has implied that he meets the criteria for an alien of exceptional ability, set forth at 8 C.F.R. § 204.5(k)(3)(ii). For example, he has a degree, is a member of the Institute for Electrical and Electronics Engineers (IEEE) and claims that his salary is indicative of exceptional ability. We note that the evidence submitted to meet the regulatory criteria for aliens of exceptional ability must be indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(k)(2). The issue of exceptional ability, however, is moot because the petitioner qualifies for the classification sought as an advanced degree professional. Specifically, the record establishes that the petitioner holds a Master's degree in Electrical Engineering from South Dakota State University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree.

A petition in behalf of either an alien of exceptional ability or an advanced degree professional normally must be supported by an alien employment certification certified by the Department of Labor. The standard for waiving that requirement is the same for both aliens of exceptional ability and advanced degree professionals. As such, evidence relating to the criteria for aliens of exceptional ability cannot serve, in and of itself, to establish that a waiver of the alien employment certification is warranted in the national interest. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218, 222.

The sole issue in this matter is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver

must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The director did not contest that the petitioner works in an area of intrinsic merit, electrical engineering or that the proposed benefits of his work, improved radio frequency identification (RFID) reader systems, would be national in scope. Rather, the director determined that the petitioner had not established that he would benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The director concluded that the petitioner had not established his influence on the field, noting that the petitioner had not published his work. On appeal, the petitioner asserts that the standards used by the director are not applicable to engineers. As stated above, we acknowledge that research and development engineers do not necessarily publish their work, especially where there are intellectual property issues. That said, we note that the alien in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215, was an engineer. Thus, we find that the standards set forth in that decision are applicable. To date, neither Congress[1] nor any other competent authority has overturned that precedent decision, which is binding on us. 8 C.F.R. § 103.3(c). *See generally Talwar v. INS*, No. 00 CIV. 1166 JSM, 2001 WL 767018 (S.D.N.Y. July 9, 2001) (upholding the standards in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 215).

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

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[1] Congress has recently amended the Act to facilitate waivers for certain physicians. This amendment demonstrates Congress' willingness to modify the national interest waiver statute in response to *Matter of New York State Dept. of Transportation*; the narrow focus of the amendment implies (if only by omission) that Congress, thus far, has seen no need to modify the statute further in response to the precedent decision.

In response to the director's request for additional evidence, the petitioner indicated that his current employer had applied for an alien employment certification but that "my case has been in Backlog Elimination Center without any information since 2004." The petitioner asserts that his employer supports his request for a national interest waiver "so that time can be saved on Labor Certification processing." Any undue delays in the alien employment certification process must be resolved with the Department of Labor. Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *Id.* at 223.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7. That said, the submission of patent applications or patents is certainly an initial showing of innovation.

The petitioner relies on his own statement and several letters from his employers. On appeal, he asserts that they are in the best position to judge the significance of his work. Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of ability are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation are the most persuasive.

According to his curriculum vitae, the petitioner worked as a senior engineer for Motorola, Inc. from 2000 to 2002, as a chief design engineer for MIL-E Service, Inc. from 2003 to 2004 and subsequently began working as an electrical design engineer for Sirit Technologies, Inc., where he remained as of the date of filing. The petitioner discusses several of his purported designs, including a partial hand prosthesis for which one of the petitioner's references provides a patent application

number on appeal. While several references purport to discuss the petitioner's role on these projects, the petitioner did not submit any patent applications or patents.

[redacted], Vice General Manager of ShongHai ZhongJing Computers, Microtek, asserts that the petitioner's designs in China "were honored by [the] concerned bureau of China." The record contains no awards.

[redacted] a senior electrical engineer with Motorola Global Telecom Solutions Section, asserts that he worked with the petitioner on a Common Base Transceiver Platform (CBTSP), the core of a third generation wireless telecommunications base station. [redacted] asserts that the petitioner made "substantial contributions" to the project, designing and implementing "the core architecture of the system." [redacted] asserts that this system "is now widely used everywhere in the nation and all over the world."

[redacted], President of MIL-E Services, asserts that while working for MIL-E, the petitioner performed design services for the company's clients. Specifically, the petitioner worked on the Helmet Assisted Radar Detection (H.A.R.D.) system for client Legal Speeding. In a subsequent letter, [redacted] founder and owner of Legal Speeding Enterprises, asserts that the petitioner "designed, prototyped, refined and supported" the device. The record establishes that Legal Speeding's H.A.R.D. device was named an "Innovation of the Month" by *Motorcycle Consumer News*. While [redacted] attempts to tout the safety aspects of this device, it is clear from the advertisement that the device is designed to help motorcyclists avoid detection of speeding violations by authorities.

[redacted] further asserts that the petitioner "was instrumental in specifying and sourcing key components and lending engineering experience" in the design of a partial hand prosthesis for Advanced Arm Dynamics, which [redacted] asserts is in use around the country. [redacted] Southwest Clinical Director at Advanced Arm Dynamics, asserts that the petitioner's input was "significant and important" during the early stages of the development of the partial hand prosthesis.

On his curriculum vitae, the petitioner claims to have also worked on a helicopter dimmer control circuit while working at MIL-E. [redacted], President of Aero Instruments, asserts that the petitioner helped Aero Instruments develop a viable solution allowing the use of domestic parts in servicing helicopters manufactured in Europe. [redacted] explains: "The differing voltage standards of the helicopters, Europe versus United States, required us to redesign the dimmer circuitry to enable the fitment of our products to a Eurospec airframe. With [the petitioner's] assistance, we were able to make it possible to use domestic parts and equipment."

Finally, [redacted], Vice President of Operations for Sirit, Inc., asserts that the petitioner is a "competent and versatile electrical engineer," who has made contributions to the company's projects. Specifically, in 2004, the petitioner developed the middleware for the company's reader systems, including the INfinity 200, designing and implementing the core architecture of this

"cutting edge communication system between the host PC and the reader system." Mr. Bergeron asserts that the INfinity 200 is now widely used in the United States, including by government agencies. In 2005, the petitioner performed similar services for the INfinity 500, utilized in supply chain to manage material goods at major warehouse applications in the United States.

While the above letters attest to the petitioner's purported innovations, the record contains no evidence that the petitioner is listed as an inventor on a patent application or patent. On appeal, Mr. [redacted] asserts that the petitioner "led our engineering efforts to design an electric partial prosthetic hand for one of our customers, Advanced Arm Dynamics." [redacted] asserts that Advanced Arm Dynamics then filed patent application 11/081,402 for the device. Published patent applications are publicly available on the website of the U.S. Patent and Trademark Office (USPTO), www.uspto.gov. Although it is the petitioner's burden to provide the required evidence, we have reviewed patent application 11/081,402, which lists the inventors of the partial hand prosthesis as [redacted] and [redacted]. The record lacks any explanation as to why the engineer who "led" the engineering efforts of this device would not be listed as an inventor. Given the absence of the petitioner's name as a listed inventor of the partial hand prosthesis, we will not consider any unsupported assertions as to the petitioner's role as an inventor.

While the petitioner's designs are no doubt of value, it can be argued that any engineering design must be shown to be original and present some benefit if it is to be pursued by an engineering company. Moreover, it is inherent to the occupation of research and development engineer to develop new products for commercial distribution. It does not follow that every research engineer who contributes to improved technological designs inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. The record lacks evidence that the petitioner has been specifically credited with the innovations discussed above in a patent application or evidence that the petitioner's innovations are viewed in the wider engineering community (as opposed to the motorcycling community) as noteworthy. We note that technology is consistently improving at a steady pace, and not every technological advance influences the field to a degree that warrants a waiver of the alien employment certification in the national interest.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.